

EMEKA PROMISE v. PP

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COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA

ZAKARIA SAM JCA

ZAMANI A RAHIM JCA

[CRIMINAL APPEAL NO: B-05-10-01-2013 (NGA)]

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24 MARCH 2015

CRIMINAL LAW: *Dangerous Drugs – Trafficking – Accused person convicted and sentenced to death – Dangerous Drugs Act 1952, s. 37(d) – Drugs found in iron cylinder – Defence of no knowledge – Whether probable – Presumption of knowledge – Whether arbitrarily invoked – Failure to deliberate on specific acts under s. 2 Dangerous Drugs Act 1952 – Whether non-direction amounted to misdirection – Prima facie case – Whether proved*

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CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Offence of trafficking in dangerous drugs – Dangerous Drugs Act 1952, s. 37(2) – Accused person convicted and sentenced to death – Drugs found in iron cylinder – Defence of no knowledge – Whether probable – Presumption of knowledge – Whether arbitrarily invoked – Failure to deliberate on specific acts under s. 2 Dangerous Drugs Act 1952 – Whether non-direction amounted to misdirection – Prima facie case – Whether proved*

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EVIDENCE: *Witness – Non-calling of witnesses – Accused person convicted and sentenced to death for offence of trafficking in dangerous drugs – Defence of no knowledge – Failure to call material witness who accused person made phone call to – Whether detrimental to prosecution's case – Whether prima facie case proved – Dangerous Drugs Act 1952, s. 37(d)*

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Acting on information that a drug trafficking activity would take place, SP7 and his team arrested the appellant, a Nigerian national, at the Kuala Lumpur International Airport ('KLIA'). At the time of the arrest, the appellant was pushing a trolley with a black bag and a plastic bag on it. In the plastic bag, car parts were found, which were, according to the appellant, samples for him to buy in Malaysia. From an iron cylinder, the police recovered two transparent plastic packets which later confirmed to contain 1,117g of methamphetamine. The trial judge found that the drugs were in the custody and control of the appellant and, by virtue of s. 37(d) of the Dangerous Drugs Act 1952 ('DDA'), further found that the court had no discretion but to invoke the presumption of knowledge under the said section. The appellant was called to enter his defence. In his defence, the appellant denied any knowledge of the drugs. The appellant submitted that he was a car body parts dealer and upon the advice of his friend, Oba, the appellant came to Malaysia to source for such parts. Oba had given the appellant certain spare parts to be given to one Moruko in Malaysia. The appellant was also given two handphone SIM cards, one bearing a Malaysian number while the other was a Nigerian number. The appellant did contact Moruko using the local SIM

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- A card and was told by the latter to meet him at Sunway Pyramid. As he was about to board the taxi outside the KLIA, the appellant was arrested. At the end of the trial, the appellant was convicted and sentenced to death. Hence, the present appeal. The issues that arose for the court's adjudication were: (i) whether the trial judge had arbitrarily invoked the presumption of knowledge under s. 37(d) of the DDA; (ii) whether the trial judge erred in finding that the appellant did not raise the defence of no knowledge; (iii) whether the trial judge erred in applying the inference of trafficking without considering which specific act under s. 2 of the DDA did the appellant traffic in drugs; (iv) the non-calling of the witness from the intelligence team and the failure to investigate the handphones seized from the appellant; and (v) the failure of the trial judge to appreciate the cautioned statement.

Held (allowing appeal; setting aside conviction and sentence of High Court)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

- (1) The application of s. 37(d) of the DDA is not mandatory. The trial judge may consider whether there was evidence to establish that the appellant had actual or *mens rea* possession of the dangerous drugs and if there was, the trial judge could make an affirmative finding of possession without having to resort to the presumption under s. 37(d) of the DDA. (paras 18 & 23)
- (2) The trial judge had erred in finding that the appellant fell short of saying that he had no knowledge of the drugs. The defence was that the appellant had no knowledge of the drugs and that the drugs belonged to Moruko. In cross-examination, the appellant confirmed that the appellant had wanted to go to Sunway Pyramid. Although SP7 could not remember the name of Moruko, he confirmed that the appellant had mentioned the name of the person that he was supposed to meet at Sunway Pyramid. The investigating officer similarly confirmed in cross-examination that the appellant had, in his cautioned statement, denied that he knew about the drugs. (paras 32 & 33)
- (3) The trial judge ought to have applied s. 2 of the DDA which stipulates the various acts under the definition of trafficking and ought to have made a finding whether the appellant was trafficking by way of carrying, concealing or any other specific acts provided. However, the trial judge did not make any reference to s. 2 of the DDA and had therefore failed to deliberate on the specific acts under the said section which the appellant was found to be trafficking in dangerous drugs. This failure was a non-direction amounting to misdirection. (para 36)
- (4) It was important for the prosecution to lead evidence on the handphones as they could confirm or negate the appellant's version on the existence of Oba and Moruko and on the defence that the appellant had no knowledge of the dangerous drugs as he was merely to deliver the same

to Moruko. Furthermore, the trial judge should undertake the two separate exercises to consider whether Oba and/or Moruko were real or fictitious characters and if they were real, whether they were real traffickers. The trial judge had failed to do this. (paras 26 & 30)

- (5) Although the cautioned statement alone could not be the basis of an acquittal, had the trial judge properly appreciated the cautioned statement which was consistent with his evidence in court and to a certain extent, with the prosecution evidence, the trial judge would have found that the appellant had rebutted the presumption of knowledge and had raised a reasonable doubt on the prosecution's case (para 34)

Bahasa Malaysia Translation Of Headnotes

Bertindak atas maklumat bahawa satu aktiviti pengedaran dadah akan berlaku, SP7 dan pasukannya telah menangkap perayu, seorang warganegara Nigeria, di Lapangan Terbang Kuala Lumpur ('KLIA'). Semasa tangkapannya, perayu sedang menolak troli dengan beg hitam berserta beg plastik di atasnya. Dalam beg plastik tersebut, bahagian-bahagian kereta dijumpai, yang mana menurut perayu merupakan sampel-sampel untuk dibeli olehnya di Malaysia. Daripada satu silinder besi, pihak polis menjumpai dua bungkusan plastik lutsinar yang kemudiannya disahkan mengandungi 1,117g methamphetamine. Hakim bicara mendapati bahawa dadah tersebut dalam jagaan dan kawalan perayu dan di bawah s. 37(d) Akta Dadah Berbahaya 1952 ('ADB'), seterusnya memutuskan bahawa mahkamah tidak mempunyai budi bicara tetapi terpaksa membangkitkan anggapan pengetahuan di bawah seksyen tersebut. Perayu dipanggil untuk membela diri. Dalam pembelaannya, perayu menafikan sebarang pengetahuan mengenai dadah-dadah tersebut. Perayu menghujahkan bahawa dia merupakan pengedar bahagian-bahagian kereta dan atas nasihat rakannya, Oba, perayu telah ke Malaysia untuk mencari bahagian-bahagian tersebut. Oba telah memberikan dua kad SIM telefon bimbit, satu adalah nombor Malaysia manakala yang satu lagi adalah nombor Nigeria. Perayu menghubungi Moruko menggunakan kad SIM Malaysia dan diberitahu oleh Moruko agar berjumpa dengannya di Sunway Pyramid. Apabila dia hendak menaiki teksi di luar KLIA, perayu telah ditangkap. Di penutup perbicaraan, perayu disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah: (i) sama ada hakim bicara telah membangkitkan anggapan pengetahuan di bawah s. 37(d) ADB dengan sewenang-wenangnya; (ii) sama ada hakim bicara terkhilaf dalam memutuskan bahawa perayu tidak membangkitkan pembelaan tiada pengetahuan; (iii) sama ada hakim bicara terkhilaf dalam mengguna pakai inferens pengedaran tanpa mempertimbangkan pelakuan khusus yang mana di bawah s. 2 ADB yang perayu mengedar dadah; (iv) kegagalan memanggil saksi daripada pasukan perisik dan kegagalan untuk menyiasat telefon-telefon bimbit yang dirampas daripada perayu; dan (v) kegagalan hakim bicara untuk mempertimbangkan kenyataan beramaran.

- A **Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman Mahkamah Tinggi)**
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:
- B (1) Pemakaian s. 37(d) ADB adalah tidak mandatori. Hakim bicara boleh mempertimbangkan sama ada terdapat keterangan untuk membuktikan bahawa perayu mempunyai milikan sebenar atau *mens rea* dadah merbahaya dan jika terbukti, hakim bicara boleh membuat dapatan afirmatif milikan tanpa perlu membuat anggapan di bawah s. 37(d) ADB.
- C (2) Hakim bicara terkhilaf dalam dapatan bahawa perayu gagal menyatakan bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah tersebut. Pembelaan adalah bahawa perayu tidak mempunyai pengetahuan mengenai dadah-dadah tersebut dan bahawa kesemuanya milik Moruko. Dalam pemeriksaan balas, perayu mengesahkan bahawa perayu ingin ke Sunway Pyramid. Walaupun SP7 tidak boleh mengingatkan nama Moruko, dia mengesahkan bahawa perayu ada menyebut nama orang yang sepatutnya dijumpai di Sunway Pyramid. Pegawai penyiasat turut mengesahkan dalam pemeriksaan balas bahawa perayu telah, dalam kenyataan beramarannya, menafikan bahawa dia mengetahui mengenai dadah-dadah tersebut.
- D (3) Hakim bicara sewajarnya mengguna pakai s. 2 ADB yang memperuntukkan pelbagai perlakuan di bawah definisi pengedaran dan sepatutnya membuat dapatan mengenai sama ada perayu telah mengedar dengan cara membawa, menyembunyikan atau apa-apa perlakuan khusus yang diperuntukkan. Walau bagaimanapun, hakim bicara tidak membuat rujukan kepada s. 2 ADB dan dengan itu, telah gagal mempertimbangkan perlakuan-perlakuan khusus di bawah seksyen tersebut yang mana perayu dikatakan telah mengedar dadah. Kegagalan ini adalah satu ketidakarahan yang terjumlah kepada salah arahan.
- E (4) Adalah penting untuk pihak pendakwaan mengemukakan keterangan mengenai telefon-telefon bimbit kerana ia boleh mengesahkan atau menyangkalkan versi perayu mengenai kewujudan Oba dan Moruko dan pembelaan bahawa perayu tidak mempunyai pengetahuan mengenai dadah merbahaya tersebut kerana dia sekadar perlu menyerahkannya kepada Moruko. Tambahan lagi, hakim bicara sepatutnya menjalankan dua langkah berbeza untuk mempertimbangkan sama ada Oba dan/atau Moruko merupakan watak-watak benar atau rekaan dan sekiranya mereka wujud, sama ada mereka merupakan pengedar-pengedar sebenar. Ini gagal dilakukan oleh hakim bicara.
- F (5) Walaupun kenyataan beramaran sahaja tidak boleh menjadi asas pelepasan, sekiranya hakim bicara mempertimbangkan kenyataan beramaran tersebut dengan betul, yang mana selari dengan keterangan
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perayu di mahkamah dan pada takat tertentu, dengan keterangan pihak pendakwaan, hakim bicara akan memutuskan bahawa perayu telah menyangkal anggapan pengetahuan dan telah membangkitkan keraguan munasabah ke atas kes pendakwaan.

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Case(s) referred to:

Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC (*refd*)

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Isidro Leonardo Quito Cruz v. PP [2013] 2 CLJ 1025 FC (*refd*)

Mohamad Radhi Yaakob v. PP 1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC (*refd*)

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC (*refd*)

Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC (*refd*)

Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA (*refd*)

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Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), (2)

Evidence Act 1950, s. 114(g)

For the appellant - Afiffuddin Hafifi; M/s Salehuddin Saidin & Assocs

Ramkarpal Singh (*Aliff Bolkin with him*); M/s Karpal Singh & Co

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For the respondent - Mazelan Jamaludin; DPP

[*Editor's note: For the High Court judgment, please see PP v. Emeka Promise* [2013] 1 LNS 67.]

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Reported by Najib Tamby

JUDGMENT**Tengku Maimun Tuan Mat JCA:**

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[1] Emeka Promise, the appellant was charged in the High Court at Shah Alam for trafficking in dangerous drugs, to wit 1,117g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act.

The Prosecution's Case

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[2] Acting on information that he had received on a drug trafficking activity involving a Nigerian national, Inspector Iqbal bin Mohd Isa (SP7) and his team (who were all in plain clothes) arrested the appellant at Gate 6 of Kuala Lumpur International Airport (KLIA).

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[3] At the time of the arrest, the appellant was pushing a trolley with a black bag (exh. P6) and a blue plastic bag (exh. P7) on it. The appellant was brought to the KLIA police station. A body search was conducted. Nothing incriminating was found on the appellant. In the bag exh. P7, the police found car parts, among others, a car lamp (exh. P8), a radiator fan (exh. P23) and an iron cylinder (exh. P9).

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- A [4] SP7 asked the appellant what the things were for. The appellant said that they were samples for him to buy in Malaysia. SP7 was suspicious of the answer. SP7 asked the appellant whether P9 could be opened. The appellant nodded his head but did not say how to open it. SP7 then hit P9 with a hammer and there were signs that it could be opened. SP7 instructed
- B L/K Badri bin Mohd Isa (SP3) to use a screw driver to pry open the lid of P9. SP3 did as instructed and he succeeded.

- [5] From P9, the police recovered two transparent plastic packets (exhs. P16A and P16B). At this point of time, the appellant became scared. He began to shiver and sweat heavily. SP7 informed the appellant that he was
- C a policeman and the appellant was told to cool down.

- [6] Upon analysis by the chemist, Dr Vanita a/p Kunalan (SP4), it was confirmed that exhs. P16A and P16B contained 1,117g of methamphetamine.

- D [7] The learned trial judge found that the drugs were in the custody and control of the appellant and in view of the word “shall” in s. 37(d) of the Act, further found that the court had no discretion but to invoke the presumption of knowledge under the said section. Having regard to the quantity and the concealment of the drugs inside the iron cylinder exh. P9,
- E the learned trial judge found that the prosecution had made out a *prima facie* case of trafficking. The appellant was called upon to enter his defence.

The Defence

- [8] The appellant was a car body parts dealer and he had a company in Nigeria, dealing with the same, called Promise International Pvt Ltd. Upon
- F the advice of his friend, Oba, who had been to Malaysia before and was aware of the Malaysian market on this trade, the appellant came to Malaysia to source for such parts. Oba had informed the appellant to meet one Moruko upon arrival at KLIA. Oba had given the appellant certain spare parts, including exh. P9 to be given to Moruko.

- G [9] Oba had also given the appellant two handphone SIM cards, one bearing a Malaysian number and the other, a Nigerian number. The appellant had contacted Moruko from Nigeria and was told to contact him again once the appellant arrived at KLIA.

- H [10] Upon arrival at KLIA, the appellant did contact Moruko using the local SIM card number that was given by Oba. Moruko told the appellant to take a taxi to Sunway Pyramid and to call him again when the appellant reached Sunway Pyramid.

- I [11] After the said phone call, the appellant purchased a taxi ticket to Sunway Pyramid. The appellant had put his baggage in the taxi and was about to board the taxi outside KLIA when he was confronted by a group of plainclothes men and was subsequently arrested.

[12] In essence, the appellant denied any knowledge of the drugs in exh. P9. He stated that he only knew about the drugs after the police officers opened P9 and showed him the drugs.

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[13] The trial judge found that the appellant had not rebutted the presumption of knowledge and had not raised a reasonable doubt on the prosecution's case. The appellant was convicted and sentenced to death. Hence this appeal.

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Appeal

[14] The following issues were canvassed before us:

- (i) That the presumption of knowledge under s. 37(d) had been arbitrarily invoked by the learned trial judge;
- (ii) The non-calling of the witness from the intelligence team and the failure to investigate the handphones seized from the appellant;
- (iii) The learned trial judge erred in finding that the appellant did not raise the defence of no knowledge;
- (iv) The learned trial judge erred in applying the inference of trafficking without considering which specific act under s. 2 did the appellant traffic in drugs; and
- (v) Failure of the learned trial judge to appreciate the cautioned statement (exh. D39).

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Our Findings

[15] Having heard the appeal, we found that there were merits in the grounds raised by the appellant. We therefore unanimously allowed the appeal and we set aside the conviction and sentence of the High Court. The appellant was acquitted and discharged. We now give our reasons.

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Application Of s. 37(d) Of The Act

[16] The first issue was in relation to the following finding of the learned trial judge (rekod rayuan, jld 3, pp. 260-261):

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... I have no reason to doubt SP7's unchallenged testimony that the drug was carried by the accused at the time of his arrest. I find SP7 and the other police witnesses to be honest witnesses who were only relating to the court what they knew about the case. On the evidence it is clear that a *prima facie* case had been established against the accused. The presumption of knowledge under section 37(d) of the Act applies against him as the drug was in his custody and under his control. The provision reads as follows:

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any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved be deemed to have in his possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

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- A The court has no discretion not to invoke the presumption once custody or control is established. The word “shall” in the provision connotes its mandatory nature. ...
- ...
- B It behoves therefore upon the accused to adduce evidence to prove to the contrary. Failure to do so means that knowledge and therefore “possession” will be established by default. But that can only be determined after the accused has given evidence in discharge of his burden of proof.
- C [17] It was the submission of learned counsel that the learned trial judge had erred in applying the statutory presumption of knowledge under s. 37(d) of the Act for the reason that the learned judge had deemed that he had no other choice. By invoking the statutory presumption of knowledge, learned counsel submitted that the trial judge had failed to consider the direct and circumstantial evidence presented and had raised the bar on the appellant to rebut the prosecution’s case without considering the principle of “fairness of the case”. Had the learned trial judge applied his mind whether *mens rea* possession could be established based on the facts and surrounding circumstances, the evidential burden on the appellant was merely to raise a reasonable doubt. In the alternative, learned counsel submitted that the trial judge had failed to consider whether the defence, on the totality of the evidence during the *prima facie* stage (including the cautioned statement), had rebutted the presumption of knowledge.
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- F [18] We found favour in the submission of learned counsel on the first issue. In our view, the application of s. 37(d) of the Act is not mandatory. Where the prosecution had succeeded in proving by direct evidence that the accused was in possession of the dangerous drugs, the trial judge may make a finding of fact that the accused had actual possession of the dangerous drugs without resort to the presumption of possession under s. 37(d). We found support in the following judgments of the Federal Court.
- G [19] In *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685, Steve Shim CJ (Sabah & Sarawak) said at pp. 755-756 (CLJ) and p. 718 (MLJ):
- H [69] ... I agree that in an appropriate case where there is sufficient or ample evidence to establish actual possession under s. 37(da) there would be no necessity for a trial judge to invoke the statutory presumption of possession under s. 37(d). The Federal Court in *Muhammed bin Hassan* has not lost sight of this proposition as reflected in that part of its judgment cited a moment ago wherein the court stated that in a proper case where the evidence so warranted, there was nothing to prevent the trial judge from coming to a factual finding of possession.
- I [70] I turn next to the case of *Tunde Apatira & Ors v. Public Prosecutor* [2001] 1 MLJ 259 where, on the facts established in evidence before the High Court, the Federal Court held that actual possession of dangerous drugs could and should have been invoked. ...

[71] Another case which demonstrates the same point can be found in the dissenting judgment of KC Vohrah JCA in *Mohamad Radzi bin Abu Bakar v. Public Prosecutor* [2002] 3 MLJ 593 wherein he said at pp 808-809 (*sic*):

The case in this appeal is not complicated and the facts establishing a *prima facie* are obvious. The learned judge had relied on s. 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact, there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. ...

[20] In *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597, Richard Malanjum FCJ (as he then was) stated that:

[14] ... under the Act there is no mandatory rule to require for the invocation of s. 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced.

[21] Abdull Hamid Embong FCJ had said in *Isidro Leonardo Quito Cruz v. PP* [2013] 2 CLJ 1025; [2013] 2 MLJ 1:

[23] ... A person who is found to be in control and custody of the dangerous drugs is deemed to be in possession if the presumption under s. 37(d) is invoked and to have known the nature of such drug (s. 37(d) DDA). Alternatively, once the prosecution has succeeded in proving by direct evidence and thus, on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s. 37(da), he is in law presumed to be trafficking in that said drug, *albeit* without any intention for its distribution or consumption.

[24] In this case, there was indisputable and direct evidence that the appellant was in possession of the said drugs in question. He even admitted to swallowing them. The learned trial judge made a positive finding that he was in possession of the drugs. We think that the learned trial judge had no other option in the face of this damaging evidence. At the end of the trial, it was the learned trial judge's finding that the appellant had failed to rebut the statutory presumption under s. 37(da)(ix) now triggered against him, on a balance of probability.

[22] In *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630, Ahmad Maarop FCJ had stated that:

[37] ... The learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15 grams, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under section 37(da) of the DDA. In our judgment, the learned trial judge was right in calling upon Siew to enter on his defence on the charge of trafficking against him.

- A [23] In the light of the above authorities, we disagreed with the learned trial judge that the court had no discretion but to invoke s. 37(d). In our view, the trial judge may consider whether there was evidence to establish that the appellant had actual or *mens rea* possession of the dangerous drugs and if there was, as clearly enunciated in the above cases, the trial judge could make an affirmative finding of possession without having to resort to the presumption under s. 37(d) of the Act.
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Investigation On The Handphones

- C [24] The defence of the appellant was that he had no knowledge of the dangerous drugs in exh. P9 as he was merely requested by Oba to deliver the same to Moruko. This version given under oath was consistent with the cautioned statement, exh. D39 and was advanced at the earliest possible opportunity to SP7 and SP8.

- D [25] It was the evidence of the appellant that upon arrival at KLIA, he had contacted Moruko through one of the handphones given by Oba and that he was about to board the taxi to Sunway Pyramid to meet Moruko when he was arrested. The handphones were seized by SP7 and the investigating officer, Inspector Siti Halifa binti Abd Ghofar (SP8) confirmed that she did not investigate the handphones as the handphones had been sent to 'Bahagian Risikan'. No officer from Bahagian Risikan was called to give evidence as to what was the outcome of the investigation on the handphones. It was the submission for the appellant that the failure to call the witness from the Bahagian Risikan attracted the adverse inference under s. 114(g) of the Evidence Act 1950.
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- F [26] We agreed with learned counsel. In our view, it was important for the prosecution to lead evidence on the handphones as they could confirm or negate the appellant's version on the existence of Oba and Moruko and on the defence that the appellant had no knowledge of the dangerous drugs as he was merely to deliver the same to Moruko.

- G [27] In this regard, it is pertinent to refer to the case of *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 where this court, making reference to *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, said:

- H [12] ... That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken.
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[28] It was the appellant's evidence that upon being arrested, the appellant informed SP7 that he was to meet Moruko at Sunway Pyramid and that he was taken by SP7 and other officers to Sunway Pyramid. On the way there, SP7 asked the appellant to call Moruko, which the appellant did. The appellant stated that he spoke to Moruko in his native language but SP7 scolded him and had asked him to speak in English. When the appellant started speaking in English to Moruko, Moruko started laughing. According to the appellant, that was probably because Moruko knew that the appellant had been arrested and that Moruko had heard SP7 scolding the appellant. When they arrived at Sunway Pyramid, the appellant tried calling Moruko again, but the call could not get through as Moruko had switched off his handphone.

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[29] We noted that the above version was denied by SP7. Be that as it may, the appellant had complied with the *Alcontara* notice. It was the duty of the prosecution to investigate the defence version, in particular the existence of Oba and Moruko from the seized handphones, which in this case, the investigating officer, SP8 admitted that she had not done so. Her evidence at pp. 150-151, rekod rayuan, jld 2 was that "saya hanya dimaklumkan daripada bahagian risikan ini jawapannya negative ... Pegawai risikan yang maklumkan itu hanya kepada Insp Iqbal, Insp Iqbal maklumkan saya.". Quite apart from the fact that it was not clear what "jawapannya negative" referred to, we agreed with learned counsel that this piece of evidence was hearsay and was inadmissible.

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[30] Further, applying *Radhi's* direction, the learned judge should undertake the two separate exercises to consider whether Oba and/or Maruko were real or fictitious characters and if they were real, whether they were the real traffickers. This, the learned trial judge had failed to do. In our judgment the failure of the trial judge to administer unto himself the *Radhi's* direction as stated in *Yee Wen Chin (supra)* amounted to a misdirection by way of non-direction.

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The Defence Of No Knowledge

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[31] Learned counsel's complaint arose from the following finding of the learned trial judge (rekod rayuan, jld 3, p. 266):

Since the presumption of knowledge applies the burden lies on the accused to prove to the contrary. The question is whether he probably did not know that there was drug in the cylinder. His explanation it will be recalled is that he was asked by Oba to pass the blue bag containing the cylinder to Maruko at Sunway Pyramid. But he fell short of saying that he had no knowledge of the drug.

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[32] We found that the learned trial judge had erred in finding that the appellant fell short of saying that he had no knowledge of the drugs. As mentioned above, the defence was that the appellant had no knowledge of the drugs and that the drugs belonged to Moruko. SP7 confirmed in cross-

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A examination that the appellant had wanted to go to Sunway Pyramid. Although SP7 could not remember the name Moruko, he confirmed that the appellant had mentioned the name of the person that he was supposed to meet at Sunway Pyramid.

B [33] SP8 similarly confirmed in cross-examination that the appellant had, in his cautioned statement, denied that he knew about the drugs. SP8 had stated (rekod rayuan, jld 2, pp. 122-123):

S17: Apakah tindakan susulan diambil oleh Insp. daripada statement penafian dalam percakapan tersebut?

C J: Berdasarkan kepada keterangan suspek dalam percakapan beramaran sememangnya suspek katakan barang yang dijumpai bukan milik suspek tapi as officer saya berpegang kepada satu elemen penting semasa tangkapan dimana dadah tersebut dirampas semasa suspek menolak troli bag berisi dadah.

D S18: ...

S19: Insp ada buat apa-apa siasatan berkenaan ownership ini selain daripada dia menolak troli tersebut?

J: Tidak ada.

E ...
...

S23: Tiga hari selepas beliau ditangkap dia telah timbulkan secara rasminya siapa yang sebenarnya memiliki dadah tersebut setuju?

J: Setuju.

F [34] Based on the above, it cannot be said that the appellant fell short of saying that he has no knowledge of the drugs. The learned trial judge had thus erred in fact in his finding, which finding was against the evidence adduced by the prosecution. In this regard we also agreed with learned counsel that the learned trial judge had failed to appreciate the cautioned statement.

G Although the cautioned statement alone could not be the basis of an acquittal, had the learned trial judge properly appreciated the cautioned statement which was consistent with his evidence in court and to a certain extent, with the prosecution evidence, the learned trial judge would have found that the appellant had rebutted the presumption of knowledge and had raised a

H reasonable doubt on the prosecution's case.

Inference Of Trafficking

I [35] The learned trial judge had invoked the presumption under s. 37(d) of the Act to find that the appellant was in possession and had knowledge of the drugs. Recognising the rule against double presumption which was applicable then, he held that the presumption of trafficking did not apply.

[36] In our view, the learned trial judge ought to have applied s. 2 of the Act which stipulates the various acts under the definition of trafficking and ought to have made a finding whether the appellant was trafficking by way of carrying, concealing or any other specific acts as provided thereunder. The learned trial judge however did not make any reference to s. 2. In the circumstances, we agreed with learned counsel that the learned trial judge had failed to deliberate on the specific acts under s. 2 which the appellant was found to be trafficking in dangerous drugs. This failure in our view is a non-direction amounting to a misdirection.

[37] Having regard to all the above, we found the conviction of the appellant unsafe. We therefore allowed the appeal and set the appellant free.

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